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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0128**

State of Minnesota,
Respondent,

vs.

Dejahn Akeem Wiley-Hunt,
Appellant.

**Filed January 17, 2023
Affirmed
Ross, Judge**

Hennepin County District Court
File No. 27-CR-19-29993

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mary F. Moriarty, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, John Donovan, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Larkin, Judge; and Bryan, Judge.

NONPRECEDENTIAL OPINION

ROSS, Judge

The state accused Dejahn Wiley-Hunt of shooting a man in the stomach outside a Minneapolis bar. A jury found him guilty of possessing a firearm as an ineligible person and second-degree assault with a deadly weapon. The district court denied Wiley-Hunt's request for a dispositional departure and sentenced him to 60 months in prison. Wiley-Hunt

argues on appeal that the district court improperly instructed the jury, that the prosecutor engaged in misconduct, and that the district court improperly denied his request for a downward sentencing departure. Because any error in the unobjected-to jury instruction was not plain and the alleged prosecutorial misconduct did not affect Wiley-Hunt's substantial rights, we affirm the convictions. Because the district court acted within its discretion by imposing the presumptive sentence, we affirm the sentence. We do not analyze additional issues that Wiley-Hunt raises without sufficient briefing.

FACTS

In November 2019 Minneapolis police responded to a report of shots fired outside a downtown Minneapolis nightclub. They found a man on the ground, shot in his stomach. A woman identified herself as the man's girlfriend and described the shooter as a five-foot-nine, light-complected black man between twenty and thirty years old. Police searched the area and collected a shell casing. They viewed security-camera footage that depicted the victim in a fight with a man wearing a black "hoodie," a white shirt, and jeans. It shows the hooded man entering a silver Chevrolet Trailblazer and then running back toward the nightclub. It depicts two men chasing the victim around the corner, the victim dropping suddenly to the ground, and the crowd scattering. A witness heard a gunshot just before watching a man in a black hoodie running away while shoving a gun under his clothing. Video footage captured hours after the shooting depicts the man wearing the black hoodie entering an apartment complex around the corner from the shooting.

Investigating officers discovered a social-media image of Wiley-Hunt taken around the time and place of the shooting. In it, Wiley-Hunt was wearing a black hoodie, white

shirt, and jeans. They also learned that Wiley-Hunt owned the silver Trailblazer and that his girlfriend lived in a unit in the apartment complex that the hooded man fled into.

Police obtained and executed a warrant to search the apartment. Inside a hamper they found a handgun hidden beneath men's clothes and a plastic baggie containing marijuana. A ballistics expert determined that the handgun fired the bullet associated with the shell casing police found at the scene. The state charged Wiley-Hunt with second-degree assault with a deadly weapon and possessing a firearm as an ineligible person.

At trial, the state offered testimonial and physical evidence supporting the events just described. This evidence included a photograph police took of the baggie of marijuana inside the hamper where they found the gun. The prosecutor asked the testifying officer to describe the image, which she did. Defense counsel did not object.

Wiley-Hunt did not testify. In making a record of Wiley-Hunt's decision not to testify, defense counsel told Wiley-Hunt that the judge would instruct the jury not to hold his silence against him. The prosecutor clarified by asking the court to inquire whether Wiley-Hunt wanted a no-adverse-inference instruction. Wiley-Hunt's attorney asked Wiley-Hunt whether he wanted the instruction, and, on his attorney's recommendation, Wiley-Hunt responded, "Sure." The district court instructed the jury accordingly.

During closing argument, defense counsel challenged the validity of the expert's shell-casing match, pointing to what he asserted were inconsistencies. The prosecutor rebutted the argument, telling the jury that what the attorneys say is not evidence and describing the expert's testimony as "unrefuted." Neither party objected to the other's closing statements or requested curative instructions.

The jury found Wiley-Hunt guilty on both charges. Before sentencing, Wiley-Hunt moved for a downward dispositional departure, seeking probation. The district court denied the motion and imposed a guidelines prison sentence of 60 and 57 months for the convictions, respectively, to be served concurrently.

Wiley-Hunt appeals.

DECISION

Wiley-Hunt challenges his convictions. He maintains that the district court erroneously gave the no-adverse-inference instruction and that the prosecutor committed misconduct by presenting the marijuana evidence and referring to the state's ballistics testimony as "unrefuted." He asserts alternatively that the district court erroneously denied his motion for a sentencing departure, and he adds other contentions in a supplemental brief. For the following reasons, we conclude that none of his arguments merits reversal.

I

We are not persuaded by Wiley-Hunt's contention that the district court's no-adverse-inference instruction requires us to reverse. He asserts that the district court gave the instruction erroneously by failing to secure his clear consent and insistence. Because he did not object to the instruction at trial, we scrutinize only under our plain-error standard of review, in which we will reverse only if a plain error impacted substantial rights. *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001). We will not deem an error "plain" unless "it is clear or obvious, which is typically established if the error contravenes case law, a rule, or a standard of conduct." *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017).

We resolve Wiley-Hunt's challenge here based on our conclusion that he has not identified an error that is plain.

Wiley-Hunt contends that giving the instruction was plain error because it contravenes caselaw. He relies on the supreme court's holding that the district court errs if it gives a no-adverse-inference instruction without a defendant's "clear consent and insistence," as stated in *McCollum v. State*, 640 N.W.2d 610, 617 (Minn. 2002), and *State v. Gomez*, 721 N.W.2d 871, 880 (Minn. 2006) (quotation omitted). But caselaw, including *McCollum* and *Gomez*, does not outline what communication is necessary to constitute either a defendant's "clear consent" or his "insistence." It therefore could not have been clear and obvious to the district court, and it is not clear and obvious to us, that Wiley-Hunt's verbal declaration of "sure," after being advised by counsel, fails to meet the clear-and-insistent requirement. We are not persuaded otherwise by Wiley-Hunt's emphasis on his attorney's incorrectly suggesting that the instruction was automatic. The prosecutor corrected the misstatement by ensuring that Wiley-Hunt was directly asked whether he wanted the instruction. We hold that the district court did not commit plain error by giving the instruction.

II

We are likewise unconvinced by Wiley-Hunt's contention that the prosecutor committed reversible misconduct by introducing the marijuana-related evidence and by referring to the firearm expert's opinion as "unrefuted." We review allegations of unobjected-to prosecutorial misconduct under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Under this standard, if the appellant

establishes that the misconduct was both error and plain, “[t]he burden then shifts to the State to demonstrate that the error did not affect the defendant’s substantial rights.” *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012). If the state does not meet its burden, we would then determine whether to address the error “to ensure fairness and the integrity of the judicial proceedings.” *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007) (quotation omitted). We need not consider whether the prosecutor’s statements constitute plain error here because, even if they do, the state has shown that the purported misconduct did not affect Wiley-Hunt’s substantial rights.

The state emphasizes the overwhelming evidence of Wiley-Hunt’s guilt and the minimal effect the alleged misconduct could have had on the verdict. The state meets its burden when it shows “that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury.” *State v. Dobbins*, 725 N.W.2d 492, 508 (Minn. 2006) (quotation omitted). In determining whether an error was prejudicial, we consider the pervasiveness of the conduct, the strength of the state’s case, and whether the defendant had the chance to rebut the improper remarks. *State v. Peltier*, 874 N.W.2d 792, 805–06 (Minn. 2016). Wiley-Hunt concedes that the alleged misconduct was not pervasive, so we consider only the strength of the state’s case and Wiley-Hunt’s opportunity for rebuttal.

The record plainly contradicts Wiley-Hunt’s assertion that the state’s case was weak. The circumstantial evidence overwhelmingly supports the jury’s guilty verdict. The shooter, who was wearing the same color and type of clothing that Wiley-Hunt was wearing the night of the shooting and whose video depictions and witness description closely match

Wiley-Hunt's appearance, got into and out of the Trailblazer that Wiley-Hunt owns and fled into an apartment complex where Wiley-Hunt's girlfriend lives, concealing inside a hamper and under men's clothing in Wiley-Hunt's girlfriend's apartment the handgun that he used to shoot the victim. It is true, as Wiley-Hunt observes, that the state did not find Wiley-Hunt's DNA on the handgun. Given the extraordinarily probative circumstantial evidence pointing to Wiley-Hunt as the shooter, the lack of DNA evidence is of little consequence. The evidence supporting the state's case was compelling.

Wiley-Hunt also contends unpersuasively that the misconduct was impossible to rebut. His counsel had the opportunity to emphasize that possessing a small amount of marijuana has no logical relationship to whether Wiley-Hunt was the shooter, and we do not believe that the marijuana evidence would impact a reasonable juror's assessment of guilt on the charged offenses. As for the isolated "unrefuted" comment, the district court's proper instructions outlining and emphasizing the state's burden of proof stood against any implication that Wiley-Hunt had the burden to refute the state's evidence. And Wiley-Hunt had the opportunity either to highlight the state's burden or to seek a curative instruction after the prosecutor's comment. That he failed to seek a curative instruction weighs against reversing. *See State v. Washington*, 521 N.W.2d 35, 40 (Minn. 1994). We add that this is not a close case where we would consider whether multiple errors might have cumulatively affected the verdict where, separately, they did not. *See State v. Fraga*, 898 N.W.2d 263, 278 (Minn. 2017). On balance, we easily conclude that any alleged misconduct did not impact Wiley-Hunt's substantial rights.

III

We also hold that the district court did not inappropriately deny Wiley-Hunt's motion for a downward dispositional sentencing departure. We review a district court's sentencing decision for an abuse of discretion. *State v. Soto*, 855 N.W.2d 303, 307–08 (Minn. 2014). A district court may—but is not obligated to—depart from a presumptive sentence when “identifiable, substantial, and compelling circumstances” justify doing so. Minn. Sent’g Guidelines 2.D.1 (2019); *Soto*, 855 N.W.2d at 308. We afford this deference to the district court because a guidelines-generated sentence is presumed to be correct, sentencing departures are by design atypical, the district court is not bound to give reasons justifying its denial of a departure motion, and the district court is not required to depart even when the circumstances would allow it to do so. *Soto*, 855 N.W.2d at 308; *State v. Abrahamson*, 758 N.W.2d 332, 337 (Minn. App. 2008), *rev. denied* (Minn. Mar. 31, 2009); *see also State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013) (“The district court is not required to explain its reasons for imposing a presumptive sentence.”). The supreme court accurately predicted in dicta that it would be a “rare” occasion when an appellate court would reverse the district court’s decision to impose a presumptive sentence under the guidelines. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). Wiley-Hunt fails to demonstrate that this is one of those unusual cases.

Wiley-Hunt says that he should have been granted a dispositional departure in part because he is amenable to probation. A district court may grant a dispositional departure based on a defendant’s particular amenability to probation. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). Wiley-Hunt’s probation-amenability assertion is belied by the fact that

he was already on probation for two other felonies at the time he committed these crimes. And the district court knew that Wiley-Hunt has a substantial criminal history that includes violent and firearms-related offenses and that his probation officer believed that he poses a danger to public safety. The district court acted within its discretion by imposing the presumptive guidelines sentence.

IV

Wiley-Hunt raises three supplemental arguments, which are forfeited for lack of proper briefing. He contends that his right to confront his accuser was violated, that he “did not receive his conditions of release in the courtroom,” and that his right to a speedy trial was violated. Arguments not supported by authority are waived. *State v. Andersen*, 871 N.W.2d 910, 915 (Minn. 2015). Wiley-Hunt fails to support his first two arguments with legal authority or clear argument, and we do not consider them. Regarding his speedy-trial contention, he offers no argument discussing the reason for the delay, his assertion of the right, and the prejudice to him, as outlined in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). We therefore will not analyze the undeveloped assertion that the timing of his trial violated his rights.

Affirmed.